PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ASSAULT AND BATTERY.

In *Palmer* v. *State*, 83 S. W. 202, the Court of Criminal Appeals of Texas holds that one who sees his brother assaulted by another has the same right to resist the assault, and is entitled to the same defences or partial defences reducing the grade of crime, as the person assaulted. Compare *Duffee* v. *State*, 8 Texas App. 187.

Right to Defend Brother

In *Risdon* v. *Yates*, 78 Pac. 641, the Supreme Court of California decides that one's plea of guilty on a prosecution for assault and battery can be received in a civil action therefor only as an admission, and the justice of the peace before whom the prosecution is had having testified thereto for plaintiff, as he had written it down in his docket, defendant may, nevertheless, cross-examine him to prove the entire statement made in connection therewith, whether written down or not, to show that it was not an unqualified admission. Compare *Root* v. *Sturdivant*, 70 Ia. 55.

Plea in Criminal Case

ASSIGNMENT.

In *Helms* v. *Helms*, 49 S. E. 110, the Supreme Court of North Carolina holds that where a deed conveys land in consideration of the support of the grantor for life by the grantee, and provides that the land shall stand good for such support, and if the grantee fails to support the grantor, the deed shall be void, the support is not a condition precedent, but a condition subsequent, and the bare possibility of a reverter arising under such condition is not assignable. Two judges dissent. Compare *Driesbach* v. *Serface*, 17 Atl. 513.

Possibility of Reverter

ATTORNEY AND CLIENT.

It is decided in *Jones* v. *Nantahala Marble and Talc. Co.*, 49 S. E. (N. C.) 94, that where an attorney wrote a letter to his client as to the litigation, bearing on the amount that might be recovered against the client, and which, if known to the opposing side, might be harmful to the client, a copy of a letter sent by the attorney to his associate counsel constitutes a privileged communication.

Privileged Communication

BANKS.

It is held by the Supreme Court of South Dakota in *Turner* v. *Hot Springs Nat. Bank*, 101 N. W. 348, that under a statute of the state providing that a check drawn on a bank or banker is payable on demand, where the drawer of a check had sufficient funds on deposit subject to check, a bona-fide holder of a check which has been duly presented and payment refused may maintain an action against the bank to recover the amount of the check. One judge dissents. Compare *Bloom* v. *Winthrop State Bank*, 96 N. W. 733.

Liability on Unaccepted Check

The United States Circuit Court of Appeals (Eighth Circuit) decides in *Shaw* v. *Nat'l German-American Bank of St. Paul, Minn.*, 132 Fed. 658, that a national bank has no power to invest its surplus fund in the stock of another national bank, and cannot be assessed thereon as a stockholder, although it actually made the purchase and held and received dividends on the stock. Compare *California Nat'l Bank* v. *Kennedy*, 167 U. S. 362.

Holding Stock of Other Banks

BONA-FIDE PURCHASER.

The Supreme Court of North Dakota holds in *Halloran* v. *Holmes*, 101 N. W. 310, that where one person is the cashier of a bank and secretary of another corporation, and is the active manager of both, a deposit by him in the bank of a consideration for a conveyance of land to the corporation of which he is secretary is not equivalent to payment to the grantor, so as to protect the grantee, as a bona-fide purchaser, when such

Payment

BONA-FIDE PURCHASER (Continued).

deposit is retained in the bank under the direction of such person and subject to his actual control, and is voluntarily paid over to the grantor after notice of the invalidity of the grantor's title.

BUILDING AND LOAN ASSOCIATIONS.

Powers

The Court of Appeals of Colorado decides in *People's Building and Loan Ass'n* v. *Purdy*, 78 Pac. 465, that a mutual building and loan association has no power to contract that stock will mature in a definite time.

BURGLARY.

Breaking

The question as to what is sufficient evidence of the "breaking" required to constitute the crime of burglary is not always an easy one to answer. A close case occurs in *Claiborne* v. *State*, 83 S. W. 362, where it is held that where one of the windows in the house which defendant entered in the nighttime had been left up from the bottom, leaving an aperture which was not large enough for a man to enter, and defendant increased the same by raising the window and thereby effecting an entrance, such act constituted a sufficient breaking to sustain a conviction of burglary. The cases dealing with situations along the boundary line between what is and what is not a breaking are collected in this decision. Compare *Marshall* v. *State*, 94 Ga. 589.

CARRIERS.

Care Owed to Passengers

The Court of Civil Appeals of Texas holds in *International and G. N. R. Co.* v. *Hubbs*, 82 S. W. 1062, that an instruction that a railroad company owes to its passengers the duty to use the highest degree of care in transporting them which a person of the highest degree of care and prudence would use under like circumstances was objectionable as constituting such a repetition on the question of degree of care required to be used as was calculated to mislead the jury. Compare *Railway Co.* v. *George*, 60 S. W. 313.

CHINESE EXCLUSION ACT.

Involuntary Servitude

An important decision in reference to the Chinese Exclusion Acts is made by the United States District Court (D. Washington, N. D.) in *United States* v. *Ah Sou*, 132 Fed. 878. It is there decided that where a Chinese female was sold as a slave in China, and her master, with the assistance of other Chinamen, brought her into the United States for immoral purposes, and after her escape she was cared for at a church home for Chinese women, and it appeared that a decree of deportation would be equivalent to remanding her to perpetual slavery and degradation, she was entitled to her discharge under the Thirteenth Amendment to the Federal Constitution, providing that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States.

CONSTITUTIONAL LAW.

Due Process of Law: Full Faith and Credit

An important decision is made by the United States Supreme Court in *National Exchange Bank of Tiffin, Ohio*, v. *Solon L. Wiley*, 25 S. C. R. 70. It is there held that due process of law is wanting in proceedings by which judgment is taken in a state court under a warrant of attorney annexed to a promissory note, authorizing confession of judgment " in favor of the holder," if the party in whose favor the judgment was rendered has ceased before the commencement of the suit to own the note or to be entitled to receive the proceeds to its own use, since such judgment is, in legal effect, a personal judgment without service or process upon the defendants and without their appearance in person or by an authorized attorney. The court makes the further holding that a judgment taken under a warrant of attorney annexed to a promissory note, authorizing confession of judgment " in favor of the holder," is not protected by the Federal Constitution and laws, when sued on in another state, from collateral attack upon the ground that the party in whose behalf it was rendered was not in fact the holder, because not the real owner of the note. See in this connection *Watson* v. *Paine*, 25 Ohio St. 340.

CONSTITUTIONAL LAW (Continued).

Eminent Domain

An extremely important decision is made by the Supreme Court of North Carolina in *Spencer* v. *Seaboard Air Line Ry. Co.*, 49 S. E. 96, with reference to the rights of minority stockholders in railroads. It is there held that a law empowering a majority of the stockholders of certain railways to consolidate with other companies, and providing for assessing and paying the value of the dissenting stock, is an exercise of the power of eminent domain, and this being so, that a dissenting stockholder cannot rely on the inhibition of the Federal Constitution, as to the impairment of the obligation of a contract, to defeat a consummated consolidation under the act, though her stock was purchased prior to the Constitution of 1868 taking effect, reserving to the state the right to amend charters granted by it, and though her stock was issued by a company whose charter was granted when there was no constitutional reservation of power to a man. One judge dissents. See *Black* v. *Delaware Canal Co.*, 24 N. J. Eq. 469.

Ex Post Facto Law

A statute of Kansas passed in 1903, which became law after a certain defendant had been convicted of a felony, provided for the "indeterminate sentence," and the defendant was sentenced to the penitentiary under that act. The law prescribing the punishment for the offence when it was committed provided for a scale of credits to be given for good behavior, but the later act of 1903 contained no such provision. It is held in *State* v. *Tyree*, 78 Pac. 525, that such later act is, as applied to crimes committed before its passage, ex post facto and unconstitutional. See *Kring* v. *Missouri*, 107 U. S. 221.

CONTRACTS.

Mutuality

It is decided by the Supreme Court of Appeals of Virginia in *American Agricultural Chemical Co.* v. *Kennedy & Crawford*, 48 S. E. 868, that a contract by which plaintiff agrees to sell fertilizer, and defendants agree to buy, having no other consideration than their mutual promises, and providing that plaintiff may cancel it at any time, is void for lack of mutuality of engagement, so that defendants may refuse to purchase, though plaintiff

CONTRACTS (Continued).

manufactures the fertilizer and puts it in sacks marked for them and makes tender thereof. Compare *Southern Railway Company* v. *Wilcox*, 98 Va. 222.

DEEDS.

In *Miller* v. *Dunn*, 83 S. W. 436, the Supreme Court of Missouri, Division No. 2, decides that a deed with habendum clause to the grantee and the heirs of her body forever, wherein the grantor covenants with the grantee and her bodily heirs to warrant the title, creates in the grantee a life estate, with remainder in fee to the heirs of the body of the grantee, though the granting clause is unlimited to the grantee. Compare *Utter* v. *Sidman*, 170 Mo. 284.

Construction: Life Estate

DESCENT AND DISTRIBUTION.

In Iowa it is provided by a statute similar to statutes in force in other jurisdictions that " No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person, or take by devise or legacy from him, any portion of his estate." The Supreme Court of Iowa, construing the statute, holds *In re Kuhn's Estate*, 101 N. W. 151, that it does not deprive a widow, who was the murderer of her husband, from her distributive share of his estate, since the widow is held to take her share not as a matter of inheritance but as a matter of contract and of right. Compare *Phillips* v. *Carpenter*, 79 Iowa, 600, and see also *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29.

Murder of Ancestor

EMINENT DOMAIN.

With three judges dissenting the Supreme Court of Kansas decides in *Kansas City Northwestern R. Co.* v. *Schwake*, 78 Pac. 431, that where a railroad company appropriates an alley in a city for the purpose of laying its tracks, and makes a deep excavation therein close to the lot line, the damage recoverable by an abutting owner is restricted to the special injury sus-

Damages to Abutting Owner

EMINENT DOMAIN (Continued).

tained by him by reason of access to and egress from his property being cut off. A landowner does not suffer damages recoverable at law for injury to lateral support of his property until the earth is so much disturbed that it slides or falls. The actionable wrong for impairment to lateral support is not the excavation, but the act of allowing the owner's land to fall. Compare *Mitchell* v. *Darley Main Colliery Co.*, 14 Q. B. D. 125.

EVIDENCE.

Real Evidence

In an action for personal injuries instituted by plaintiff against a city, the Supreme Court of Nebraska holds that it was not error for the trial court to permit the plaintiff, although crippled, to walk to the witness stand in the presence of the jury: *City of Minden* v. *Vedene*, 101 N. W. 330.

Varying Written Instruments

The general rule that the actual consideration of a deed may be shown by parol evidence to be other than that recited therein is well known. As an exception thereto it is decided by the Supreme Court of North Carolina in *Deaver* v. *Deaver*, 49 S. E. 113, that where the payment of the consideration is necessary to sustain the validity of a deed or contract, the acknowledgment of payment is contractual in its nature and cannot be contradicted by parol proof; but where it is to be treated merely as a receipt for money, it is only prima facie evidence of the payment, and the fact that there was no payment, or that the consideration was other than that expressed in the deed, may be shown by parol. See *Kendrick* v. *Insurance Co.*, 124 N. E. 315.

Telegrams

The Supreme Court of North Carolina decides in *U. B. Blalock & Co.* v. *W. D. Clark & Bros.*, 49 S. E. 88, that in an action for non-delivery of cotton, under an option for sale of which plaintiff had accepted by telegram, it was competent to prove the telegram by the testimony of the operator at the sending office, who, though not the operator who sent it, testified that he brought it from the file in his office.

INSANE PERSONS.

Imprisonment: Due Process of Law

The laws of North Carolina (Pub. Laws 1899, page 25, c. 1, sec. 65) provides that when any person accused of murder shall be acquitted on the ground of insanity the court shall in its discretion commit him to the hospital for the dangerous insane. *In re Boyett*, 48 S. E. 789, the Supreme Court of the state, considering this provision, holds it unconstitutional as authorizing restraint without due process of law. The acquittal on the ground of insanity is regarded as equivalent to an acquittal on any other ground, and it is therefore only upon a due inquiry resulting in the finding of insanity that an order of commitment is permissible. Compare *Underwood* v. *The People*, 32 Mich. 1.

INSURANCE.

General Commercial Law

In *Gordon* v. *Ware Nat. Bank of Ware, Mass.*, 132 Fed. 444, the United States Circuit Court of Appeals (Eighth Circuit) applies the rule of *Swift* v. *Tyson*, and decides that the question whether or not an insurable interest in an assignee is requisite to the validity of the assignment of a policy of life insurance, which was originally issued to one who had an insurable interest, is a question of general law, upon which the decisions of the courts of the state in which the assignment was made are not controlling in the Federal courts.

INTERSTATE COMMERCE.

Traffic Pool

An important decision in reference to the Anti-pooling Act of Congress of February 4, 1887, c. 104, occurs in *Interstate Commerce Commission* v. *Southern Pac. Co.*, 132 Fed. 829. The United States Circuit Court (S. D. California) decides that a rule and practice adopted and put in force by agreement between competing railroads and their connecting lines, by which a through rate on a certain class of traffic is conditioned on a reservation to the initial carrier of the absolute and unqualified power to route the shipments beyond its own line, for the declared purpose of enabling such initial carriers to control and maintain the rate so fixed by preventing

INTERSTATE COMMERCE (Continued).

competition, either direct or indirect, between their connecting carriers, create in effect a traffic pool within the meaning of section 5 of the Interstate Commerce Act. Compare *United States* v. *Trans-Missouri Freight Association,* 58 Fed. 93.

LACHES.

Compare with Limitation

The Supreme Court of California decides in *Cahill* v. *Superior Court of City and County of San Francisco,* 78 Pac. 468, that the defence of laches differs from that of limitation in that in order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must have been such lapse of time that it may reasonably be supposed that such prejudice will result if the remedy is allowed.

LIBEL.

Telegraph Companies

A telegraph company cannot be subjected to punitive damages because of the transmission and delivery of a libellous message by its agents, where no malice or wrongful intent is shown on the part of either the company or its agents other than might be inferred from the acts themselves: United States Circuit Court of Appeals (Fifth Circuit) in *Western Union Tel. Co.* v. *Cashman,* 132 Fed. 805. Compare *Milwaukee, etc., Ry. Co.* v. *Arms,* 91 U. S. 493.

MASTER AND SERVANT.

Fellow-Servants: Stranger

An important holding occurs in *Kentucky and I. Bridge and R. Co.* v. *Snydor,* 82 S. W. 989, where it is decided by the Court of Appeals of Kentucky that the doctrine of non-liability of a master for injury to a servant caused by the negligence of a fellow-servant is based upon the implied contract of the servant to assume the risk of his fellow-servant's negligence, and does not extend to a stranger to the relation, who, in conjunction with a servant, injures a fellow-servant of the latter, but he is liable, like any other joint tort feasor.

MASTER AND SERVANT (Continued).

It is decided by the St. Louis Court of Appeals in *Dale* v. *Hill-O'Meara Const. Co.*, 82 S. W. 1092, that an em-

Fellow-Servants

ployee of a subcontractor does not, as against the contractor, assume the risk from negligence of the latter's employee.

MORTGAGES.

In *Bray* v. *Allison*, 83 S. W. 96, the Court of Appeals of Kentucky decides that a mortgage, though using the pro-

Estate Conveyed

nouns "I" and "my," being signed by both husband and wife, included the wife as well as the husband, though she was not named in the body of the instrument, and was therefore sufficient to cover the grantor's homestead interest in the land. See, however, *Davis* v. *Bartholomew*, 3 Ind. 485, and a very recent decision in Kentucky, *Beverly* v. *Waller*, 74 S. W. 264.

MUNICIPAL BONDS.

In *Susong* v. *Cokesbury Tp., Abbeville County, S. C.*, 132 Fed. 567, the United States Circuit Court (D. South

Property Charged with Payment

Carolina) decides that the fact that in transferring a township into a new county, after it had issued bonds, a small portion of the territory was left in the old county, does not prevent that within the limits of the new county from being subjected to taxation for the payment of the bonds. Compare the very recent decisions of *Taylor* v. *Township of Pine Grove*, 132 Fed. 565, and *Planters' and Savings Bank* v. *Huiett Tp.*, 132 Fed. 627.

MUNICIPALITIES.

In *Bryant* v. *Logan*, 49 S. E. 21, the Supreme Court of Appeals of West Virginia decides that a lease for the term

Use of Public Property

of one year, with right to extend it for five years, by a city of a part of a public park, to improve it, and use it at times for training and running race-horses, for a rental to the city, reserving access at times to the public for riding and driving on the track, is not an unlawful diversion of such park from its legitimate use, and the lease is not void. Compare *New Orleans* v. *Louisiana Co.*, 140 U. S. 654. It is further held with reference

MUNICIPALITIES (Continued).

to the question as to who might complain if the use had been unlawful, that citizens and taxpayers, simply as such, stating no special harm to them different from others, cannot enjoin the use of a lease of a part of a city park made by the city for a term of years for the purpose of racing horses.

PLEADING.

Inconsistent Defences

In *Western Travellers' Acc. Ass'n* v. *Tomson*, 101 N. W. 341, the Supreme Court of Nebraska decides that where the insurer denies that the policy was in force at the time of the loss, a defence which is based upon the conditions of the policy, such as that proofs of loss were not furnished in accordance therewith, is inconsistent with another defence which asserts that no policy was in force at the time of the loss. Compare *Blodgett* v. *McMurtry*, 39 Neb. 210.

PRINCIPAL AND AGENT.

Authority of Local Agent of Railroad

In *Daniel* v. *Atlantic Coast Line R. Co.*, 48 S. E. 816, the Supreme Court of North Carolina holds that a cashier in the local office of a railroad, whose duties are to collect money for freight, and sell tickets to passengers, and forward the money to the railroad's treasurer, is without authority to cause the arrest of one whom he suspects of having stolen money from the office of which the agent is in charge, and the railroad cannot be held responsible for his wrongful act in making a false arrest and instigating a malicious prosecution on account of such theft. Compare *Stevens* v. *Ry. Co.*, 10 Exch. 351.

SHERIFFS.

False Return

The Supreme Court of Missouri decides in *Smoot* v. *Judd*, 83 S. W. 481, that a sheriff's return of service of summons is conclusive except in an action against the sheriff for a false return; and a bill in equity will not lie to set aside a default judgment based on the false return, showing proper service, unless plaintiff in the action was a party to the false return, or knew of it, and, so knowing, took advantage of it, and was guilty of fraud in the very act of procuring the judgment.

STARE DECISIS.

In *John T. New* v. *Territory of Oklahoma*, 25 S. C. R. 68, the United States Supreme Court holds that it will not consider itself bound on the question of its jurisdiction by a prior case in which jurisdiction was entertained without any suggestion as to the want of it. Compare in connection with this case *United States* v. *More*, 3 Cranch, 159, 172.

Appeals

TAXATION.

In *St. Louis, etc., Railway Company* v. *Davis*, 132 Fed. 629, the United States Circuit Court (E. D. Arkansas, W. D.) decides that the action of state authorities in taking the entire valuation of the property of a railroad company, without as well as within the state, and dividing it upon a mileage basis for the purpose of fixing the value of that within the state for purposes of taxation, is not in violation of the commerce clause of the Federal Constitution.

Railroad Property

TELEPHONE COMPANIES.

In *City of Wichita* v. *Old Colony Trust Co.*, 132 Fed. 641, the United States Circuit Court of Appeals (Eighth Circuit) decides that a conveyance by a telephone company to another company of all its lines, poles, wires, switch-boards, and appurtenances in a city carries with it by necessary implication the franchise from the city under which the system is being operated, although it is not expressly mentioned.

Conveyance of Property

VACCINATION.

The Supreme Court of North Carolina decides in *Hutchins* v. *School Committee of Town of Durham*, 49 S. E. 46, that under the charter of a city, giving the school board power to prescribe such rules as might be just and lawful for the management of the school, the board had authority at a time when an epidemic of smallpox prevailed to make vaccination a prerequisite to a scholar's attendance; and it was applicable to a child, though owing to her physical condition vaccination would be dangerous; but, it is said, the fact that it would be dangerous to vaccinate the plaintiff's daughter owing to

Authority of School Board

VACCINATION (Continued).

her physical condition would be a defence for her to an order for general compulsory vaccination, though it is no reason why she should be excepted from a resolution excluding from the school all children who have not been vaccinated. Compare *State* v. *Hay*, 126 N. C. 999.

VENDOR AND PURCHASER.

Against the dissent of two judges the Supreme Court of Michigan decides in *Byrne* v. *Werner*, 101 N. W. 555, that cut stone and structural iron belonging to the owner of a partially completed building, secured by him for use in the building, and lying on the lot on which the building stood and on an adjoining one, passed by the owner's warranty deed of the lot containing the building.

Building Materials on Premises

WATER COURSES.

The Supreme Court of Kansas decides in *Baldwin* v. *Ohio Tp.*, 78 Pac. 424, that the owner of lands through which a natural water course flows may accumulate surface waters falling upon lands adjacent thereto and cast the same into such stream without becoming liable to a lower riparian owner for damages so long as the natural capacity of the stream is not exceeded. Compare *Miller* v. *Laubach*, 47 Pa. 154.

Riparian Owner: Surface Water

WILLS.

In *Wicker* v. *Wicker*, 49 S. E. 10, it appeared that a testator devised all his real estate to his wife for life, and provided, as to the lands devised to his children in remainder, that if any child died before testator or before his wife, his children should have in remainder, after the death of the wife, the share of land which the deceased parent of such children would have taken had the parent survived testator and his wife. Under these facts the Supreme Court of South Carolina decides that the will vests in a son at the testator's death a transmissible interest in remainder, and where the son died during the life of his mother the fee passed to his heirs at law. Compare *Boykin* v. *Boykin*, 21 S. E. 513.

Construction: Vested Remainder